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Supreme Court of the United States

OCTOBER TERM, 1925, No. 80.

FREDERICK C. HICKS, as Alien Property Custodian, and FRANK WHITE, as Treasurer of the United States,
Petitioners,

v.

BENJAMIN GUINNESS *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF AMICI CURIAE.

WILLIAM D. GUTHRIE,
LEWIS R. CONKLIN,
ISIDOR J. KRESEL,
BERNARD HERSHKOPF,
Amici Curiae.

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v.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF OF *AMICI CURIAE.*

In the above entitled cause, reported below *sub nomine Guiness* v. *Miller,* 299 Fed. 538, the Circuit Court of Appeals held that a pre-war indebtedness in German marks, due to an American from a German whose property had been seized by the Alien Property Custodian, was to be allowed to the American, under section 9 of the Trading with the Enemy Act, at the rate of exchange which prevailed on the day when the indebtedness was due and the German debtor failed to pay, that is, at the rate of exchange on the day of the breach. In making that ruling, the court

below rejected the Government's contention that the rate of exchange obtaining on the day of judgment should have been taken instead.

The undersigned are interested in the question referred to, as counsel for an American creditor somewhat similarly situated, and pray leave to file this brief in support mainly of the position urged by the respondents in the case at bar.

I.

The rate of exchange prevalent on the day of the breach is the proper measure of damage.

The case at bar, and the case in which the undersigned are interested, concern a past due pre-war mark indebtedness of a German who failed to pay the same when it became due. We shall, therefore, deal only with that species of controversy, although it is our opinion that the same rule of damages should obtain, with respect to the point herein involved, in both tort and contract cases.

The fundamental purpose of the law in awarding damages is manifestly to make the plaintiff whole for the injury suffered by him. That injury occurs, in the case of a debt, when the money due is not paid on the due date. It should, therefore, obviously follow that then and there arises the plaintiff's right to compensation. If it were possible for the law to act forthwith, it would, in justice, at once and at that time, require payment of the indebtedness to the creditor. In that way he would have his due and no more.

But, of course, it is not practicable for the courts to accomplish their purposes of justice with any such celerity.

Hence, it is submitted, that they should, despite the inevitable delay attributable to the machinery of the law and fortuitous causes, so mould their processes and so shape their rules as to effectuate substantially the same result; in other words, they should do justice, in the end, as of the time when, under the ideal conditions, it would have been done, namely, as of the very day of the defendant's wrong or breach. In that manner, the plaintiff is awarded indemnity and the defendant made to pay only what he should have paid. In that manner, the right of the plaintiff and the liability of the defendant are both clear and known from the very accrual of the cause of action, are reasonably certain, and are automatically fixed by an external standard over which neither party ordinarily has or can have any control. In brief, we have then a clear, simple and uniform rule, with which neither plaintiff nor defendant can speculate, and which is consonant with substantial justice in the great majority of cases.

In our opinion, the foregoing simple considerations dispose of the question in the case at bar. If it be just to grant the plaintiff what he would have had on the day fixed for performance, then in the case of a German mark indebtedness, he should at least have the marks that were then due. But courts in the United States give relief only in dollars; and, furthermore, they know that foreign money fluctuates; that the German mark of one year may, in reality, be a totally different thing, for all practical purposes, from the mark of another year, and hence that justice and common sense are not and cannot be served merely by awarding the equivalent in dollars of the number of marks due, at the rate of exchange existing on *any* date. Some date must, therefore, be selected; and, if indemnification of the plain-

tiff is to be accomplished by our courts, that date should be the date when the foreign money was due and should have been paid, namely, the breach date. If our courts could have been invoked on that day and the defendant then immediately cast in judgment, the dollar value of the mark on that day would manifestly have been awarded, and thus substantial justice accomplished. The mere fact that the mill of the law grinds exceedingly slow should make no difference. Its aim must still be to do the same measure of justice, to make the plaintiff whole; and, consequently, he should have on the day of judgment, whenever that is actually arrived at, the same amount as if the courts could have instantly brought the defendant to book—he should have the precise equivalent of performance, viz., the dollar equivalent of the foreign money at the rate of exchange on the day of breach. As stated in an analogous case (*Barry* v. *Van Den Hurk,* [1920] 2 K. B. 709, 712):

> "The plaintiff, whether he be buyer or seller, may issue his writ immediately the breach of contract takes place; the damages are then crystallized, and they do not change afterwards."

The law is indisputably a practical and common sense institution. It should not therefore commit itself to rules which involve absurdity and injustice and make its results depend largely upon chance or fortuitous circumstances. Such consequences are, however, inevitable under the Government's contention that the rate of exchange prevailing on the day of judgment should be applied. Mr. Justice McCardie pointed that out in *Lebeaupin* v. *Crispin,* [1920] 2 K. B. 714, 722, where, referring to the argument now pressed by the Government, he declared:

> "The damages payable would [under that theory] depend partly on the date when the plaintiff issued

> his writ, partly on the length of the interlocutory proceedings, partly on the illness or good health of the parties as the trial approached, partly on the number of prior cases which occupied the time of the court, and partly on whether the judge reserved his decision or not. They might depend also on whether judgment was entered for the plaintiff by the judge of first instance, or by the Court of Appeal or by the House of Lords. Such a state of things would, I think, be most unsatisfactory."

The House of Lords took the same view in the case of the *S. S. Celia,* [1921] 2 App. Cas. 544, 558, where it was said that—

> "Waiting to convert the currency till the date of judgment only adds the uncertainty of exchange to the uncertainty of the law's delays."

See also *Page* v. *Levenson,* 281 Fed. 555, 558-9.

With all deference, it should also be observed that the Government's contention, if adopted as law, would have a demoralizing influence upon both litigants and lawyers. It would offer litigant and counsel a premium to hasten or delay the trial according to their notions about the money market. Thus, if there were a steadily rising rate of exchange, the plaintiff would find it to his interest to delay commencing suit, and to delay trial after suit were begun, in order to secure judgment at the time when the rate was the highest. In that case he would be speculating in foreign exchange at the defendant's expense. Likewise if there were a steady falling market, it would be to the advantage of the defendant and his attorney to delay the day of judgment as long as possible. There would then be a resort to dilatory tactics, and a gambling in foreign exchange by the defendant at the plaintiff's expense. It is clear that

if the Government's contention should prevail, it would add new unwholesome elements and influences in the practical administration of justice.

The rule now urged upon the court by the undersigned is sanctioned by the weight of authority and the best considered recent cases. *Wormser Bros.* v. *F. Marrouquin & Co.*, 249 Fed. 428, 430 (C. C. A., 5th Cir.); *Page* v. *Levenson, supra* (D. C. Md.); *Guinness* v. *Miller*, 291 Fed. 769 (S. D. N. Y.), affirmed, 299 Fed. 538, now before this court herein; *Dante* v. *Miniggio*, 298 Fed. 845 (Ct. App., D. C.); *Wichita Mill & E. Co.* v. *Namlooze, etc. Industrie*, 3 F. (2d) 931, 932 (C. C. A., 5th Cir.); *S. S. Celia* v. *S. S. Volturno* [1921], 2 App. Cas. 544, 547-9, 561; *Lebeaupin* v. *Crispin* [1920], 2 K. B. 714; *Barry* v. *Van den Hurk* [1920], 2 K. B. 709, 712; *Di Ferdinando* v. *Simon* [1920], 3 K. B. 409, 414, affirming [1920], 2 K. B. 704; *Société des Hotels du Touquet-Paris-Plage* v. *Cumming* [1921], 3 K. B. 459; *In re British American Continental Bk.* [1922], 2 Ch. 575, 581, 583, 587, and *id.* 589, 593; *Uliendahl* v. *Pankhurst, Wright & Co.* [1923], 39 Times Law Rep. 628; *Peyrae* v. *Wilkinson* [1923], 156 Law Times 341; *Pavenstedt* v. *N. Y. L. Ins. Co.*, 203 N. Y. 91; *Gross* v. *Mendel*, 225 N. Y. 633; *Katcher* v. *American Exp. Co.*, 94 N. J. L. 165, 171; *Simonoff* v. *Granite City Nat. Bk.*, 279 Ill. 248, 255; *Grunwald* v. *Freese*, 34 Pac. 73 (Cal.).

It is a fallacy to argue that, as the marks could have been tendered in Germany at any time after the breach and thus the debt extinguished there, only the value of the marks at the time of judgment should be allowed in the courts of this country. We pass over, for the moment, the obvious and vital consideration that the possibility of such a tender during the war did not exist. The conclusive

answer should be that, in fact, no such tender was ever made or attempted. Hence no benefit should accrue to the defendant therefrom, either directly or indirectly.

Again, involved in the suggestion is an extra-territorial effect for German law to which no other nation is bound to accede. The mark may be legal tender in Germany and thus individuals there may have to yield to the liquidation of their mark indebtednesses by the payment of the marks due, even after the due date. But the United States is not obligated by the German legal tender laws, and certainly not where their plain effect is the defeat of justice. Comity calls for no such sacrifice in our tribunals. We have the right, and indeed the duty, to recognize that failure to pay on the due date at once created the liability, and that subsequent attempted payment of the mere amount of marks originally due is not performance at all.

Marks in the United States are really a commodity and not money. While the legal tender of a country may, in that country, be held by legal fiat at a given and constant value, a commodity is never regarded by the law in any like manner. Foreign money is, consequently, not protected by law in the United States from ordinary scrutiny into the true or market value thereof. Whatever may be proper in Germany,* here marks due on one date are not

* Not even in Germany have the courts acquiesced, with any degree of unanimity, in the suggestion that a pre-war mark indebtedness is properly satisfied and discharged by payment of a like amount of depreciated marks. The State Court of Appeals of Darmstadt on March 29, 1923 (Weekly Law Review, No. 10, p. 459, Leipszig, May 15, 1923), refused to sanction that procedure. It declared "that in good faith in the case of a loan it does not conform to the intention of the contract that the amount advanced in gold or full-valued paper may be returned in well-nigh worthless paper of the same face value, needs no exposition." See also article of Dr. Best, Chief Judge, Darmstadt Court of Appeals, *id.*, p. 451.

assumed to remain of the same value thereafter, any more than other commodities dealt in in our markets. No seller would be permitted to discharge his obligation to deliver a given quantity of merchandise on a day certain by tendering the goods a year later; and no more rightly may a debtor owing foreign money, satisfy his obligation, under our law, by tendering it long after it fell due.

Judge Learned Hand refuted that contention in the case at bar in the District Court (291 Fed. 769). He then said (pp. 770, 771):

> "No court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs. But since, apart from specific performance, such an obligation must be discharged in the money of that sovereign, none other being available, the obligation so created can only be measured in that medium. The form of the obligation must therefore be to indemnify the victim for his loss in terms of the money of the foreign sovereign, and that obligation necessarily speaks as of the time when it arose; that is, when the loss occurred. . . .
>
> "There is, in my judgment, no sound basis for distinction between torts and contracts to pay fixed sums of money. The confusion arises from the assumption that payment after the due date is performance. But that appears to be untrue. A promise to pay a sum at a given day is not a promise to pay then or later. When the promisor defaults, he fails to perform the only promise he has made, and his liability is as much a new creation of the law

as though he had failed to deliver a chattel; or, if it be insisted that his liability is an alternative performance, still that performance is not to pay at any later time, but generally to indemnify the promisee, subject, of course, to the limitations imposed by law. That liability is, as it seems to me, quite analogous to the obligation to indemnify raised upon a tort, and the same reasoning should apply to it. A foreign sovereign will raise an equivalent obligation, but couched in terms of its own money, because that alone it has the power to secure."

II.

THE PRE-WAR DATE IS PLAINLY THE DATE CONTEMPLATED BY THE TRADING WITH THE ENEMY ACT AS THE PROPER TIME FOR CONVERTING MARK INDEBTEDNESS INTO MONEY OF THE UNITED STATES IN CASES UNDER SAID ACT.

Whatever disposition of the question here mooted might be made upon the consideration of common law principles alone, it is submitted that the Trading with the Enemy Act requires the holding to be as herein contended. Section 9 of the Act specifically provides for the recovery by Americans from the Alien Property Custodian of the pre-war debts due from Germans whose property has been seized. No debt is to be allowed, it is provided, "unless it was owing to and owned by the claimant prior to October 6, 1917" (sec. 9, subd. E). Manifestly the statute contemplates that the situation as it was before the war—"prior to October 6, 1917"—shall be crystallized and fixed. Debts then due and owing may be allowed by the President or awarded to the claimant by the courts. The same debt, whether allowed by the President or by the courts, is evi-

dently intended to remain the same throughout and to be payable in dollars at its pre-war value. So the Circuit Court of Appeals held in the case at bar (299 Fed. at p. 540), Circuit Judge Manton declaring that—

> "Any other conclusion would cause confusion and a lack of uniformity in the application of its provisions. It would distort the statute under which the suit is brought to hold that the amount of the debt recoverable thereunder was variable, depending upon the date of judgment. Such a construction would nullify that portion of the statute which permits the president to order the payment of the debt without a judgment."

Similar considerations must have dictated the provisions in the Versailles Treaty of Peace which fixed the value of the mark, for the purpose of liquidating claims of the nature here involved, at "the pre-war rate of exchange" (part X, sec. III, art. 296, subd. d).

III.

WHATEVER MIGHT OTHERWISE BE THE CORRECT RULE OF LAW IN PEACE, THE WAR CONDITIONS REQUIRE THE REJECTION OF THE GOVERNMENT'S CONTENTION.

Even if we put aside what has been written above and assume that in normal times the contention of the Government would be correct, it, nevertheless, does not follow that the same rule must be applied in the case at bar or in similar causes. When war was declared between the United States and Germany all intercourse between our citizens and Germans, of course, became illegal. It thereupon became practically impossible for the German debtor

to make a tender of marks to his American creditor and thus discharge the obligation. For their own purposes the nations at war placed the parties in that position, and thus put the debt in suspense and jeopardy. That circumstance, it is submitted, in any event distinguishes cases like that at bar from those in which, in times of peace, a sum of foreign money is due from a citizen of one country to a citizen of another.

The war operated directly to depreciate German currency. All the while that the process of depreciation was going on, neither the creditor nor the debtor was permitted by the law either to demand and collect or to receive and discharge the indebtedness. The loss to be suffered, therefore, by the creditor, if he is to be paid at the recent depreciated value of the mark, is consequently and directly due to the war. It is plainly unjust that American citizens should now have to take in payment and discharge of debts, due them in marks from Germans, at the recent low rates of exchange rather than at the pre-war rates. Fairness and equity should not permit the loss directly resulting from the war to be visited upon the American creditor. Such a rule could have only one of two results: If the money now in the hands of the Alien Property Custodian were hereafter repaid to the German, he would make a profit at the expense of his American creditor. If the money in the hands of the Alien Property Custodian were hereafter retained by the United States, then the Government would have a profit at the expense of its innocent citizen. In neither case could the profit be regarded as conscionable or right.

It is submitted that the precedents which most nearly approximate the situation at bar, in the aspect now under

discussion, are those which were decided after the Civil War in respect of debts payable in Confederate money. It had at first been held, in reference to contracts dischargeable in Confederate money, that the amount due in such cases was the value of the Confederate money at the time and place when due. But in *Effinger* v. *Kenney*, 115 U. S. 566, this court pointed out the inadequacy and injustice of that rule. There it appeared that the sum of Confederate money was due and payable at a time subsequent to the fall of the Confederate States of America and when that money, therefore, had no value at all; and, if the obligation had been liquidated in accordance with the rule of the decisions first made, the court would have had to decree that the plaintiff was entitled to no more than nominal damages. The injustice of such a holding was patent; and, consequently, it was laid down by this court that contracts dischargeable in Confederate money were rightly to be discharged only by paying, in the money of the United States, the value of the Confederate money at the time and place where the contract was made.

In that manner substantial justice was accomplished. The creditor got just what he gave; the debtor was compelled to pay precisely what he received. The time when they made their arrangement and the time when they must have contemplated the value of the currency with which they dealt, was thus taken by this court, for the purpose of fixing the recovery and adjudging the legal rights of both debtor and creditor, as the date which would best accomplish justice between the parties.

A similar rule could appropriately be applied in cases like that at bar. That thought apparently won the approval of Circuit Judge Rose in *Page* v. *Levenson*, 281 Fed. 555, 559, for he there remarked that—

"Much might be said in favor of taking the date of the contract as that on which the conversion should be made, for then each party bargains with knowledge of what the consequences of a breach will be."

Conclusion.

For the foregoing reasons, it is submitted that the contention of the Government that the conversion of mark indebtedness should be made at the rate of exchange prevailing at the time of decree, is erroneous and should not be adopted by the court.

Washington, D. C., October 12, 1925.

William D. Guthrie,
Lewis R. Conklin,
Isidor J. Kresel,
Bernard Hershkopf,
Amici curiae.

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On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF OF *AMICI CURIAE*, WHO ARE ALSO SOLICITORS FOR THE RESPONDENTS, CARL JOERGER, *ET AL.*, AND APPLICATION FOR PERMISSION TO BE HEARD AND TO FILE BRIEF.

THOMAS G. HAIGHT
AMOS J. PEASLEE
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On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Application to be Heard *Amici Curiæ*.

We respectfully ask for permission to file a brief and for one of us to be heard *amici curiæ*.

We represent the defendant partnership firm of Delbruck, Schickler & Company, against whose property in

the hands of the Alien Property Custodian and the Treasurer of the United States this suit was instituted, and we also represent other German banks and bankers whose property was seized by the Alien Property Custodian, and against whom similiar suits have been instituted by American depositors. One of these suits—*Zimmermann et al.* vs. *Hicks, etc. and the Deutsche Bank*—has already been decided by the Circuit Court of Appeals for the Second Circuit in favor of our client the Deutsche Bank, and is now in this Court on appeal (Nos. 629 and 630, October term 1925).

One of the questions presented in this case—if this Court finds it necessary to decide it—*i. e.*, the interpretation of some of the provisions of the Treaty of Versailles, *will* arise in the *Zimmermann-Deutsche Bank* case and in similar suits instituted against other banks and bankers. It is of very great importance. Other questions in this case of like importance *may* arise in those cases.

Delbruck, Schickler & Company were not represented in the court below except through the Alien Property Custodian. As they filed no answer and did not appeal from the decision of the District Court or apply for a writ of certiorari to review the decision of the Circuit Court of Appeals, save as it may be considered that those steps were taken by the Alien Property Custodian as their representative, there may be some doubt as to whether they may now be heard as a matter of right in this Court. Consequently this application is made to be heard *amici curiæ*.

We have been assured by counsel for the Alien Property Custodian and the Treasurer of the United States—hereinafter referred to as "Counsel for the Government"—and counsel for the plaintiffs that they will not object to this application.

BRIEF

The Questions

The briefs of counsel for the Government and counsel for the plaintiffs set forth the following questions as being presented for decision, but, as will be hereinafter pointed out, it may not be necessary to decide some of them:

1. In a suit under Section 9 of the Trading with the Enemy Act, is a *mark* indebtedness which became due and payable from a German citizen to an American citizen *before the outbreak of the late war,* to be converted into American currency at the rate of exchange prevailing at the date when the indebtedness became due and payable or at the date when judgment in such suit is entered?

2. If the rate of exchange to be used under such circumstances is that prevailing at the date of the entry of judgment, *i. e., the judgment date,* do any of the provisions of the Treaty of Versailles, which were incorporated in the Treaty of August 25th, 1921, between the United States and Germany (herein referred to as "the Treaty of Berlin"), require that the pre-war rate of exchange be used in suits under Section 9 of the Trading with the Enemy Act?

3. Does interest run on such indebtedness during hostilities, irrespective of treaty provisions?

4. If interest does not otherwise run during hostilities, do any of the provisions of the Treaty require that interest be allowed during that time, in suits under Section 9 of the Trading with the Enemy Act?

It is apparent that if the rate of exchange to be applied is that prevailing when the indebtedness became due and payable, *i. e., the breach date,* it will *not* be necessary for this court to decide in the case at bar whether any provisions of

the Treaty of Versailles have been stipulated for its or their benefit.

Therefore, it seems clear that although the Treaty of Versailles was not ratified as such by the United States, the nationals of the United States are entitled by virtue of Act of Congress and the Treaty of Berlin to whatever rights, privileges and advantages were stipulated for the benefit of nationals of the Allied and Associated Powers in the Treaty of Versailles. In this regard Article II of the Treaty of Berlin reads as follows:

> "With a view to defining more particularly the obligations of Germany under the foregoing Article with respect to certain provisions in the Treaty of Versailles, it is understood and agreed between the High Contracting Parties:
>
> (1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1, of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV and XV."

The only question, consequently, is whether the Treaty of Versailles confers any rights, privileges or advantages upon an American national bringing an action under Section 9 of the Trading with the Enemy Act.

Among the provisions of the Treaty of Versailles, to the benefit of which the United States and its nationals are entitled, are the provisions of Part X, entitled "Economic Clauses." In Section IV of Part X is found Article 297 entitled "Property, Rights and Interests." Under this Article the United States was entitled to re-

tain and liquidate all the property which had been taken under its control through the operation of the Trading with the Enemy Act and which is now found in the hands of the Alien Property Custodian. Subdivision (h) of Article 297 provides as follows:

> "(h) Except in cases where, by application of paragraph (f), restitutions in specie have been made, the net proceeds of sales of enemy property, rights or interests wherever situated carried out either by virtue of war legislation, or by application of this Article, and in general all cash assets of enemies, shall be dealt with as follows:
>
> (1) As regards Powers adopting Section III and the Annex thereto, the said proceeds and cash assets shall be credited to the Power of which the owner is a national, through the Clearing Office established thereunder; any credit balance in favour of Germany resulting therefrom shall be dealt with as provided in Article 243.
>
> (2) As regards Powers not adopting Section III and the Annex thereto, the proceeds of the property, rights and interests, and the cash assets, of the nationals of Allied or Associated Powers held by Germany shall be paid immediately to the person entitled thereto or to his Government; the proceeds of the property, rights and interests, and the cash assets, of German nationals received by an Allied or Associated Power shall be subject to disposal by such Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto. Any property, rights and interests or proceeds thereof or cash assets not used as above provided may be

retained by the said Allied or Associated Power and if retained the cash value thereof shall be dealt with as provided in Article 243.

In the case of liquidations effected in new States, which are signatories of the present Treaty as Allied and Associated Powers, or in States which are not entitled to share in the reparation payments to be made by Germany, the proceeds of liquidations effected by such States shall, subject to the rights of the Reparation Commission under the present Treaty, particularly under Articles 235 and 260, be paid direct to the owner. If on the application of that owner, the Mixed Arbitral Tribunal, provided for by Section VI of this Part, or an arbitrator appointed by that Tribunal, is satisfied that the conditions of the sale or measures taken by the Government of the State in question outside its general legislation were unfairly prejudicial to the price obtained, they shall have discretion to award to the owner equitable compensation to be paid by that State."

It will be observed that Sub-paragraph (1) of Subdivision (h) relates to Powers which adopt Section III of Part X of the Treaty of Versailles. Sub-paragraph (2) of Subdivision (h) relates to Powers which do not adopt Section III.

Section III of Part X of the Treaty of Versailles, being Article 296 and Annex, relates to a settlement through the intervention of Clearing Offices established by the respective parties, as stated in said Article. It was not contemplated at the time of the negotiation of the Treaty of Versailles that the United States should adopt the plan set forth in Section III and establish the

clearing offices mentioned therein. Accordingly, the Treaty did not make the provisions of Section III obligatory upon the Allied and Associated Powers, but gave to each of them an option (Art. 296, Annex (1)). It may be said in passing that one of the reasons why it was not contemplated that the United States should adopt the clearing office plan was that under paragraph (b) of Article 296 the Powers adopting that plan would make themselves responsible for the payment of debts, as stated, and it was not expected that legislation to this effect would be readily obtainable in the United States.

But, while the United States did not contemplate the adoption of the clearing office plan, a definite provision was made to meet its situation in Paragraph 4 of the Annex following Article 298. This paragraph is as follows:

> "All property, rights and interests of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights and interests, including companies and associations in which they are interested, in German territory, or debts owing to them by German nationals, and with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war. The amount of such claims may be assessed by an arbitrator appointed by Mr. Gustave

Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI. They may be charged in the second place with payment of the amounts due in respect of claims by the nationals of such Allied or Associated Power with regard to their property, rights and interests in the territory of other enemy Powers, in so far as those claims are otherwise unsatisfied."

This paragraph relates to property, rights and interests of German nationals within the territory of an Allied or Associated Power, and it thus embraces the property, rights and interests of German nationals within the territory of the United States and which have been taken over under the Trading with the Enemy Act and are held in the possession of the Alien Property Custodian. Paragraph 4 relates to the net proceeds of the sale, liquidation or other dealing with this property, for Article 297 entitled the United States to sell, liquidate and deal with this property. Paragraph 4 expressly provided that the property, rights and interests of German nationals within the United States and the net proceeds of their sale, liquidation or other dealing therewith might be charged by the United States with certain claims and liabilities stated in that paragraph. Among such charges it is provided that such property and proceeds might be charged with "*debts owing to them* (that is, to United States nationals) *by German nationals*"; that is to say, it was expressly agreed in the Treaty of Versailles that the property in the hands of the Alien Property Custodian, taken under the Trading with the Enemy Act, could be charged with debts owing to citi-

zens of the United States by citizens of Germany. While the provision of Article 4 obviously was intended to apply to the United States, there is interesting internal evidence, aside from the use of the term "Associated Power," of this intent in the provision that the property in the hands of the Alien Property Custodian could be charged with the payment of claims growing out of acts committed by the German Government since July 31, 1914, and "before that Allied or Associated Power entered into the war." That was the American contribution to this portion of the Treaty of Versailles.

Provision is made in Paragraph 4 for an assessment of claims by an arbitrator appointed by Mr. Gustave Ador, or if he made no appointment by an arbitrator appointed by the Mixed Arbitral Tribunal, provided for in Section VI. In lieu of setting up the Mixed Arbitral Tribunal, the United States Government entered into a claims convention with Germany, for the presentation and consideration of claims. The assessment by such a Tribunal was not, however an exclusive provision, for the United States under Article 297 was to have the right to retain and liquidate the property belonging to German nationals within its teritory and to carry out its liquidation in accordance with its laws.

Referring again to Sub-paragraph (2) of Sub-division (h), it will be seen that this relates to the United States as a Power not adopting Section III (for the United States, as was contemplated, has not adopted Section III, the clearing office plan), and this sub-paragraph provides that the proceeds of the property of German nationals received by the United States shall be subject to disposal by the United States, in accordance with its laws and regulations, and may be applied

in payment of the claims and debts defined by Article 297 and by Paragraph 1 of the Annex, above quoted.

Thus there is the most explicit provision that the United States, under its treaty with Germany (the Treaty of Berlin), is entitled to the benefit of this provision in the Treaty of Versailles, is entitled to charge against the property in the hands of the Alien Property Custodian the debts owing to its nationals, and having provided remedies to its nationals by Section 9 of the Trading with the Enemy Act, there is direct treaty support of the right of these nationals to obtain that recovery for their debts from the property in the hands of the Alien Property Custodian, in accordance with the provisions of the Trading with the Enemy Act.

In Paragraph 14 of the Annex which follows Article 298 and is the Annex referred to in Article 297 appears the following provision:

> "The provisions of Article 297 and this Annex relating to property, rights and interests in an enemy country, and the proceeds of the liquidation thereof, apply to debts, credits and accounts. Section III regulating only the method of payment.
>
> In the settlement of matters provided for in Article 297 between Germany and the Allied or Associated States, their colonies or protectorates, or any one of the British Dominions or India, in respect of any of which a declaration shall not have been made that they adopt Section III, and between their respective nationals, the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange

and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the coming into force of the present Treaty notify Germany that the said provisions are not to be applied."

This, again, is a provision to the benefit of which the United States and its nationals are entitled by the explicit provisions of the Treaty of Berlin. And while the United States did not adopt the clearing office plan of Article 296 of the Treaty of Versailles, it became entitled by virtue of Paragraph 14 of the Annex following Article 298, being the Annex referred to in Article 297, with respect to the rate of exchange and interest which had been provided in Section III, for it is stated in Paragraph 14 that in the settlement under Article 297 where a Power has not made a declaration adopting Section III, which is the case of the United States, and between the respective nationals, that is, between the nationals of the United States and the nationals of Germany "the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the coming into force of the present Treaty notify Germany that the said provisions are not to be applied." No one would contend, or could contend, that the United States had given any such notice. Accordingly, the citizens of the United States, in enforcing their rights under the Trading with the Enemy Act, conserved by the Treaty of Berlin, making applicable the provisions of the Treaty of Versailles, are entitled to have the rate of exchange and of interest

And the following provision is found in Paragraph 22 of the Annex to Article 296:

> "Subject to any special agreement to the contrary between the Governments concerned, debts shall carry interest in accordance with the following provisions:
>
> Interest shall not be payable on sums of money due by way of dividend, interest or other periodical payments which themselves represent interest on capital.
>
> The rate of interest shall be 5 per cent. per annum except in cases where, by contract, law or custom, the creditor is entitled to payment of interest at a different rate. In such cases the rate to which he is entitled shall prevail.
>
> Interest shall run from the date of commencement of hostilities (or, if the sum of money to be recovered fell due during the war, from the date at which it fell due) until the sum is credited to the Clearing Office of the creditor.
>
> Sums due by way of interest shall be treated as debts admitted by the Clearing Offices and shall be credited to the Creditor Clearing Office in the same way as such debts."

Thus, under Paragraph (d) above quoted, American nationals are entitled to the pre-war rate of exchange and, under Paragraph 22 above quoted, the rate of interest is defined.

It is quite evident that the Circuit Court of Appeals in the case at bar did not understand the provisions of the Treaty of Versailles and failed to give them appropriate effect. Thus it is said that it was recognized that

applied which are specified in the provisions of Section III.

Turning then to the provisions of Section III, thus incorporated by reference in Paragraph 14 of the Annex following Article 298, the following provision is found in Sub-division (d):

> "(d) Debts shall be paid or credited in the currency of such one of the Allied and Associated Powers, their colonies or protectorates, or the British Dominions or India, as may be concerned. If the debts are payable in some other currency they shall be paid or credited in the currency of the country concerned, whether an Allied or Associated Power, Colony, Protectorate, British Dominion or India, at the pre-war rate of exchange.
>
> For the purpose of this provision the pre-war rate of exchange shall be defined as the average cable transfer rate prevailing in the Allied or Associated country concerned during the month immediately preceding the outbreak of war between the said country concerned and Germany.
>
> If a contract provides for a fixed rate of exchange governing the conversion of the currency in which the debt is stated into the currency of the Allied or Associated country concerned, then the above provisions concerning the rate of exchange shall not apply.
>
> In the case of new States the currency in which and the rate of exchange at which debts shall be paid or credited shall be determined by the Reparation Commission provided for in Part VIII (Reparation)."

the plan of Article 296 (Clearing Office plan) had not been adopted by the United States. And reference is made to the provision of Paragraph 14 of the Annex to Article 297, above quoted. But, when the Court came to deal with Article 297, it apparently failed to appreciate the terms of that Article, for the Court says at 299 Fed. 542, 543:

> "Article 297 has no reference to payment of debts of Germans due an American. In part of section IV of Article 297, which is headed 'Property Rights and Interest,' provision is made for dealing with and liquidation of property belonging to nationals of allied and associated powers who were in Germany during the war, or property of Germans which was within the territory of the allied and associated powers during the war. It is true that sub-division 14 of the Annex to Section IV includes debts, credits, and accounts, but that is a provision under Article 297, which does not deal with the payment of debts between nationals of various powers, shall include within its scope not only tangible property within the various countries, but also intangible. Credits are made property within the meaning of Article 297 between Germany and the associated states and between their respective nationals. The provisions of Section III respecting currency in which payment is to be made and the rate of exchange and interest shall apply unless the governments of the allied and associated powers concerned shall, within six months of the coming into force of the present treaty, notify Germany that such provisions are not to be applied. Sub-division 14 provides that in the

settlement of matters provided for in Article 297, the provisions as to the rate of exchange and interest provided for in Section III shall apply. And Article 297 provides for the liquidation by the allied and associated powers of all property rights and interest belonging, at the time of the coming into force of the present treaty, to German nationals and companies controlled by them within the territories of the allied and associated powers. Thus the provisions as to the rate of interest and exchange provided for in Section III are made applicable to Article 297 by Subdivision II of the Annex to Section IV, namely, in the instance of the liquidation of properties of Germans within the United States.

Sub-division E of Article 297 provides that nationals of the Allied and Associated Powers shall be entitled to compensation with respect to damage or injury inflicted upon their property rights or interests, including any company or association in which they are interested in German territory as it existed on August 1, 1914. This is another instance where the rate of exchange and interest applied, namely, where Germany liquidates the property of American nationals where the property was in Germany as of August 1, 1914, Germany must use the rate of exchange and interest provided for in Section III. We regard these provisions of Article 297 as having no application to a suit under Section 9 of the Trading with the Enemy Act, when the purpose of the suit is to collect a debt owing to an American citizen out of the property of an enemy in the United States, where the property has been seized by the Alien Property Custodian and now

> held by the Treasurer of the United States. The rate of exchange is in no way provided for, if such procedure is instituted under Article 297 of the Treaty of Versailles."

This quotation, dealing with Article 297, starts out with the extraordinary statement: "Article 297 has no reference to payment of debts of Germans due an American." Counsel confess that they are unable to understand this statement, as Paragraph 4 of the Annex following Article 298, which is ordinarily called the Annex to Article 297, was inserted for the express purpose of protecting debts due by Germans to Americans. That was not only the purpose but that is the explicit provision of the Article. In view of this misconception, it is hardly necessary to follow the reasoning of the Court, for it was obviously mistaken. The Court deals with Paragraph 14 of the Annex following Article 298, called the Annex to Section IV, but disposes of it by saying that "that is a provision under Article 297, which does not deal with the payment of debts between nationals of various Powers," whereas Article 297, as we have shown, deals expressly with the debts due the nationals of the United States as an Associated Power from German nationals and deals with these debts in relation to the liquidation of property of German nationals held by the United States. By taking debts due from Germans to citizens of the United States out of Article 297, the Court below would defeat the whole purpose of this part of the Treaty of Versailles negotiated by the American Government, and, while not ratified, saved in these provisions by the Treaty of Berlin. The Court of Appeals concludes its statement by saying, after referring

to Sub-division (e) of Article 297, that it regards these provisions as having no application to a suit under Section 9 of the Trading with the Enemy Act, when the purpose of the suit is to collect a debt owing to an American citizen out of the property of an enemy in the United States, where the property has been seized by the Alien Property Custodian and now held by the Treasurer of the United States. But the provisions of Article 297, that is to say, of Paragraph 4 of the Annex following Articles 297 and 298, and referred to in Article 297, apply expressly to the case of a debt owing to an American citizen which is to be satisfied out of the property of an enemy in the United States and are intended directly to apply to the case where property had been seized by the Alien Property Custodian and now held by the Treasurer of the United States. Section 9 of the Trading with the Enemy Act is a method adopted by the United States to permit an American citizen to get his debt out of the property of a German national, and is contemplated by the Treaty of Versailles and the Treaty of Berlin.

It should be borne in mind that in considering the rights of the parties under the Treaty of Berlin applying the provisions of the Treaty of Versailles, the question as to whether or not the debt *owed* by the German defendant to the plaintiffs was *due* on any particular date is irrelevant. Paragraph 22 of the Annex (Section III) to Article 296 of the Treaty of Versailles, relating to interest, is made applicable by paragraph 14 of the Annex in Section IV (following Article 298), and paragraph 22 expressly covers the cases of debts falling due during the war. Such debts are clearly within paragraph 4 of the Annex following Article 298 as being debts to the

payment of which property held by the Alien Property Custodian may be applied. The purpose of Section 9 of the Trading with the Enemy Act is to cover such cases. Plaintiffs clearly have a right, under Section 9 of the Trading with the Enemy Act to bring an action against the Alien Property Custodian to establish a debt *owing* to them by the German national. While there is a restriction that such debt must have been *owing to and owned by them* on October 6, 1917, there is no limitation requiring that it must have been due prior to that date or at any particular date. The debts defined in paragraph 4 of the Annex to Article 297 (following Article 298) of the Treaty of Versailles, are "debts *owing*" to American nationals by German nationals, and by the express words of paragraph 14 of the same Annex the provisions of Article 297 are made to apply to *"debts, credits* and *accounts."* There is no limitation in this section of the Treaty which requires proof that the debt be *due* on any particular date. The only significance of the question as to whether or not the debt was due arises in determining *under the common law and aside from treaties* the rate of exchange at which the debt shall be paid. If the plaintiffs below are compelled to rely alone upon their rights at common law and aside from treaties to establish the debt claimed under Section 9 of the Trading with the Enemy Act, the question of the due date of the debt is relevant to determine the rate of exchange applicable and the date from which interest shall run. However, since the Treaty (Paragraph 14, Annex Section IV applying Article 296 (d) Section III) specifically directs the application of a uniform rate of exchange to all debts *owing* by German nationals to American nationals and to all *credits and accounts,*

whether due or not, it seems clear that the only evidence necessary to establish the plaintiffs' case is to prove a debt owing from the German defendant to the plaintiffs, which was owned by them prior to October 6, 1917. This has concededly been done. We submit that under the Treaty between the United States and Germany of August 25, 1921, which is law in this country, the plaintiffs have the above described rights with reference to rate of exchange and rate of interest.

II.

Section 9 of the Trading with the Enemy Act is to be liberally construed, and applies to the claim in this suit.

This section of the Act requires that for the maintenance of a suit thereunder it is necessary only that there be a debt *owned by and owing* to the claimants prior to October 6, 1917. If these provisions are met the cause of action exists.

Section 9 of the Act has received recent interpretation by this Court in *Miller* v. *Robertson*, 266 U. S. 243. There Mr. Justice Butler, speaking for the Court, said with regard to the general interpretation which the Act is to receive, and particularly Section 9:

> "At the time of the passage of the Act, a large amount of property was owned and much business was carried on by alien enemies and their allies in this country. Congress determined that their property should be taken over and that trade

> with them should cease. The purpose was to weaken enemy countries by depriving their supporters of power to give aid. But the seizure of the money and property of the enemies and their allies would tend to hinder and might embarrass or ruin those having business transactions with them. *By the taking, the property seized would be put out of the reach of persons claiming it and beyond the power of creditors to attach it for debt.*" (Italics ours.)

It is apparent, therefore, that the Court recognized that one of the necessary effects of the Trading with the Enemy Act was to prevent American nationals, such as the plaintiffs here, from enforcing by attachment suit their rights to collect a debt owing from a German national. But for the provisions of the Trading with the Enemy Act, plaintiffs could unquestionably have brought a suit for the amount of the indebtedness and could have attached the property of the defendant German debtor situated in this country. The Court, in effect, says that the Trading with the Enemy Act was not intended to penalize the American creditor by taking from him the right of attachment suit and other remedies without giving to him in lieu thereof some other means for the collection of his claim. The Court then goes on to say:

> "The purpose of Section 9 was to prevent or lessen losses and inconvenience liable to result to non-enemy persons. This provision is highly remedial and should be liberally construed to effect the purposes of Congress and to give remedy in all cases intended to be covered (cites cases). The just purpose of the section is not to be defeated

by a narrow interpretation or by unnecessarily restricting the meaning of the word within technical limitations (cites cases).

Appellants contend that 'debt,' as used in Section 9, is limited to its common law meaning. Undoubtedly, Congress intended to include causes of action which at common law were enforceable in an action of debt, such as those arising on bonds, notes, and other express promises to pay (citing cases) *quantum meruit* and *quantum valebat* (cite cases).

The meaning of the word 'debt' as used in many statutes, is not restricted to demands enforceable in actions of debt."

The learned Justice then cites many examples of statutory construction in which the word "debt" is given a broad meaning, and continues:

"There is nothing in the language of the act of the reasons for its enactment to indicate a purpose to restrict the right to institute suits in equity as authorized in Section 9 to causes of action cognizable in debt under technical procedural rules. The words of a statute are to be read in their natural and ordinary sense, giving them a meaning to their full extent and capacity, unless some strong reason to the contrary appears (cites cases).

We think it is immaterial whether plaintiff's cause of action is one for which an action of debt might be maintained. It would be unreasonable and contrary to the intention of Congress to exclude claims like that here in question, and we hold them to be included."

Giving the statute the interpretation indicated by this Court in the above quoted case, it would appear that the claim here is for a debt cognizable under Section 9 of the Trading with the Enemy Act. The ordinary meaning of the word "debt" is an obligation due or about to become due, embracing a sum due upon demand regardless of whether or not a demand has actually been made. There can be no dispute that according to the ordinary meaning of the words of the statute, as this Court has directed them to be interpreted, the state of facts here shown gives a cause of action to the plaintiffs.

It is to be observed that the only limitation upon the language of the applicable subdivision of the section is:

> "Nor in any event shall a debt be allowed under this section unless it was *owing to and owned by* the claimant prior to October 6, 1917" (Section 9 (e)). (Italics ours.)

There is no provision that the debt must be actually due at that time. As a general rule of statutory construction it is held that the word "owing" in a statute means that a debt exists but not necessarily that it has become presently due and payable. We submit that the expressions of this Court in the *Robertson* case indicate that this is the correct meaning to be given here.

CONCLUSION.

For the foregoing reasons, it is submitted that the contention of the Alien Property Custodian and the Treasurer of the United States, that the conversion of the mark indebtedness should be made at the rate of exchange prevailing at the time of decree and that the provisions of the Treaty of Versailles do not apply, is erroneous and should not be adopted by the Court.

Respectfully submitted,

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Amici Curiae.

Washington, D. C., October 20, 1925.